STATE OF MICHIGAN

COURT OF APPEALS

DAIMLERCHRYSLER CORPORATION,

Plaintiff-Appellee,

v

MOTION INDUSTRIES, INC.,

Defendant-Appellant.

UNPUBLISHED
November 21, 2006

No. 269979
Wayne Circuit Court
LC No. 04-417688-CK

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

In this indemnification action, defendant Motion Industries, Inc., appeals as of right from a judgment awarding plaintiff DaimlerChrysler Corporation damages of $631,732.88, plus statutory interest. The judgment was entered after the trial court granted plaintiff's motion for summary disposition, following which the parties stipulated to the amount of damages. We affirm.

This case involves an indemnification clause in a purchase agreement between the parties. The clause purports to indemnify plaintiff for its own negligence. Plaintiff brought this action for indemnification pursuant to the agreement after defendant's employee, Stephen Watt, was injured while riding in a Cushman cart driven by plaintiff's employee, William Little. While driving through the plant, Little encountered a scrubber machine that had been called to clean up an oil spill on the floor. When Little saw the scrubber, he tried to slow down, but the cart fishtailed on the oily surface and collided with the scrubber and a guardrail, injuring Watt. In an underlying personal injury action, Watt alleged that he was injured and his leg broken because Little carelessly, negligently, and recklessly drove the cart while Watt was a passenger.

Plaintiff moved for summary disposition under MCR 2.116(C)(10). The trial court rejected defendant's arguments that the indemnification provision was not enforceable either because Little's conduct amount to gross negligence, or because the parties' agreement was governed by MCL 691.991, and accordingly, granted plaintiff's motion.

This Court reviews the trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and

that the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

On appeal, defendant argues that plaintiff was not entitled to summary disposition because there is a genuine issue of material fact whether Little's conduct amounted to gross negligence.

A party may contract against liability for damages arising from its own ordinary negligence. *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617-618; 513 NW2d 428 (1994). However, a provision that indemnifies a party for gross negligence is void. *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). Gross negligence has been defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id*.

Viewed in a light most favorable to defendant, the evidence showed that Little knew that scrubbers made the floors wet and slippery, but did not know there was oil as well as water on the floor. Little made several turns with the cart as he traveled through the plant without incident before he came to the aisle where the scrubber was working. There were no warning cones in the area to alert Little to the oil spill. There was no evidence that Little accelerated the vehicle or failed to react when he saw the scrubber. Instead, he tried to slow down, but lost control of the vehicle on the slippery floor. Neither Little nor Watt believed the cart was going too fast. One witness thought Little might be going too fast, but agreed that his speed would not have made a difference if the cart had been going more slowly. Little was cited for "carelessness/recklessness."

Although the evidence supports a conclusion that Little was negligent, it does not support a finding that his conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury" would result. *Xu, supra* at 269. The trial court did not err in finding that the evidence failed to raise a genuine issue of material fact with regard to gross negligence.

Defendant next argues that the indemnification clause was unenforceable under MCL 691.991, which provides:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

This statute applies to indemnification clauses in contracts "relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance."

Here, the parties had a purchase contract, not a contract for construction, alteration, repair, or maintenance. Watt was an outside salesperson whose job was to service plaintiff's maintenance department by identifying and providing parts. Watt explained:

> They would have a product that they need – that they needed to replace or have assistance when they were not able to identify it. They would hand me the part to physically identify it. I would get my calipers and measure it up or whatever was necessary, ruler or whatever, necessary to measure that product up, and then go into the catalogs and look up exactly what that part was and provide quotations to that requester hopefully to purchase to give a quotation on it.

Watt did not physically install any parts and all actual maintenance was performed by plaintiff's employees.

Although the parts that were procured and supplied by Watt were used for maintenance, the scope of the statute does not extend to suppliers of those engaged in maintenance. Cf. *Pritts v J I Case Co*, 108 Mich App 22, 34-35; 310 NW2d 261 (1981). The trial court correctly determined that MCL 691.991 is not applicable. Because MCL 691.991 does not apply, it is unnecessary to address defendant's remaining issue.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski